

An Update on Michigan Sentencing Law & Procedure Seminar & Webcast

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Restitution

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RESTITUTION

I. Restitution is mandatory for crime victims

- Michigan Crime Victim's Rights Act (CVRA) mandates restitution for all felonies, "serious misdemeanors" and juvenile adjudications of same
[MCL 780.751 *et seq* (Articles I, II and III of the CVRA)]
- State Constitution mandates restitution
[Const 1963, art 1.I, sec 24]
- Code of Criminal Procedure mandates restitution for all felonies, misdemeanors and ordinance violations (not just crimes covered by CVRA)
[MCL 769.1a]
- the result of mandated restitution is that restitution is no longer a subject of plea or sentence bargaining and defendants are on notice that restitution will be a part of any criminal sentence
[*People v Ronowski*, 222 Mich App 58, 61 (1997)]

II. Who can recover restitution

- "victim" can include a decedent's estate, businesses, corporations, "other legal entities", and governmental agencies
 - not monies spent by a governmental agency for normal investigation
[*People v Newton* 257 Mich App 61, 68-70 (2003)]
 - loss of "buy money" is allowed
[*People v Crigler*, 244 Mich App 420, 427 (2001)]
- payment to third parties (including insurance companies) who have compensated the victim or the victim's estate
[MCL 780.766(8), MCL 769.1a(8) *People v Orweller* 197 Mich App 136, 139-140 (1992)]
- victims of uncharged crimes or victims involved in the criminal "course of conduct" even if "those specific losses were not the factual predicate for the conviction"
[*People v Gahan*, 456 Mich 264, 270-273 (1997)]

- the Michigan Supreme Court noted that “totally dissimilar crimes committed at different times may not satisfy the ‘course of conduct’ requirement”
[*Gahan*, p 273 n 11]
- a panel of the Court of Appeals has held that restitution was appropriate for a larceny offense for which defendant was acquitted and but occurred at the same time as the assaultive offense of which she was convicted
[*People v Kim Lee*, COA # 216365 (unpublished) 2000 Mich. App. LEXIS 398 (2000)]
- co-defendants do not have rights under the CVRA which would include restitution nor do prisoners except that they may submit a written statement at sentencing
[MCL 780.752(3) and (4)]

III. What is restitution

- statutory list is lengthy and is duplicated in the CVRA and the Code of Criminal Procedure - “direct or threatened physical, financial or emotional harm”
[MCL 780.766(1) and MCL 769.1a(1)]
- after tax loss of income, homemaking and child care expenses, professional services, funeral expenses of a crime that results in physical or psychological injury
- restitution should allow victims to recoup losses suffered as a result of a criminal course of conduct
[*People v Grant*, 455 Mich 221, 230 (1997)]
- “course of criminal conduct” is to be broadly construed
[*People v Gahan*, 456 Mich 264, 272 (2002)]
- restitution is a form of punishment
[*People v Slocum*, 213 Mich App 239 (1995)]

IV. Restitution orders

- restitution is governed by the statute in effect at the time of sentencing
[*People v Gahan*, 456 Mich 264, 270 (2002)]
- it appears that co-defendants are joint and severally liable for full restitution to a crime victim
[MCL 780.766(1), MCL 769.1a(1), and *People v Grant*, 455 Mich 221 (1997)]
- in some circumstances the parents of a juvenile defendant may be ordered to pay

restitution

[MCL 780.766(15)(16)and(17) and MCL 780.794(15)(16) and (17)]

- restitution shall be immediate unless the trial court orders payment within a “specified period or in specified installments”
[MCL 780.766(10) and MCL 769.1a(10)]
- restitution payments to a victim shall be a set-off against any amount later recovered in compensatory damages in civil proceedings
[MCL 780.766(9) and MCL 769.1a(9)]
- an order of restitution is effective until it is paid in full and is a judgment and lien against “all property of the defendant” enforceable by the prosecutor, a victim or any other person or entity named in the order to receive restitution - such lien may be recorded “as provided by law”
[MCL 780.766(13) and MCL 769.1a(13)]
- restitution orders “shall be a condition of probation, parole or a conditional sentence”
[MCL 780.766(11) and MCL 769.1a(11)]
- an order of restitution survives the death of the defendant
[*People v Peters*, 449 Mich 515, 517 (1995)]

V. Procedures

- a court may order a probation officer to determine the amount of restitution and is entitled to rely on the amount in a PSIR unless there is a timely objection by the defendant
[MCL 780.767(2) and *People v Ho*, 231 Mich App 178, 192-193 (1998)]
- courts need no longer consider defendant’s ability to pay as that language was deleted from the CVRA by amendment in 1996
[MCL 780.767(1) and *People v Grant*, 455 Mich 221, 239-240 (1997) at n 24]
- a court may calculate interest for the loss of the “use of money” as restitution where appropriate
[*People v Law*, 459 Mich 419 (1999)]
- a court may order the defendant to execute a wage assignment to pay restitution as a condition of probation
[MCL 780.766(18) and MCL 769.1a (15)]

- a court shall order payment of at least 50% of restitution from any cash bond posted by the defendant as well as fines and costs
[MCL 780.67(7) and MCL 775.22(2)]
- two statutes allocate payments of fines, costs and restitution
[MCL 775.22(2) and MCL 760.766a]
- a copy of the order of restitution should be sent to Department of Corrections when a defendant is remanded to DOC jurisdiction
[MCL 780.766(19) and MCL 769.1a (16)]
- payment shall be made to the victim first, then to any third party
[MCL 780.766(8)]

VI. Restitution Hearing

- upon a timely objection to the amount of restitution, a trial court must hold a restitution hearing
[*People v Ho*, 231 Mich App 192-193 (1998)]
- if the amount is in dispute, a hearing is appropriate with burden of proof of the amount of the loss on the prosecutor by a preponderance of the evidence
[MCL 780.767(4) and *People v Gahan*, 456 Mich 264, 276 (1997)]

VII. Enforcement

- a defendant “who is not in wilful default” of the restitution obligation may at any time petition the sentencing judge (or his or her successor judge) to modify the **method** of payment and the court may do so if it determines that the current order will impose a manifest hardship on the defendant or his or her immediate family **and will not impose a manifest hardship on the crime victim**
[MCL 780.766(12) and MCL 769.1a (12)]
- when restitution is a condition of probation, the probation officer assigned to the case shall review payment not less than twice yearly and shall conduct a “final review” not less than 60 days before the order of probation expires
[MCL 780.766(18) and MCL 769.1a (15)]
- if the probation officer finds that restitution is not being paid, he or she shall make a written report and provide a copy of the report to the prosecuting attorney
[MCL 780.766(18) and MCL 769.1a (15)]

- the court shall take prompt action to compel compliance upon a motion that there has not been payment but the defendant may **not** be jailed, imprisoned or incarcerated for failure to pay “unless the court determines that the defendant has the resources to pay the ordered restitution and has not made a good faith effort to do so”
[MCL 780.766(14) and MCL 769.1a (14) and *People v Collins*, 239 Mich App 125 (1999)]
- a judgment of sentence that suspends jail time imposed upon payment of restitution serves the same purpose as imposing jail or imprisonment for failure to pay and is improper under MCL 780.766(14) and a defendant cannot be required to serve the “suspended” time absent a finding that he or she had the ability to pay and was in willful default
[*People v Collins*, 239 Mich App 125, 136 (1999)]
- in determining whether or not to revoke probation, parole or impose imprisonment because the defendant has not made a “good faith effort” to pay restitution, the court “shall consider the defendant’s employment status, earning ability, and financial resources, the willfulness of the defendant’s failure to pay and any other special circumstance that may have a bearing on the defendant’s ability to pay”
[MCL 780.766(11) and MCL 769.1a (11)]

VIII. Miscellaneous issues

- if the crime victim cannot be located or refuses to claim the restitution within 2 years after the date “on which he or she could have claimed the restitution” the restitution shall be deposited in CVR Fund
[MCL 780.766(21)]
- a crime victim may claim any such monies deposited in the CVR Fund by applying to the court that originally ordered and collected it
[MCL 780.766(21)]
- a court may not impose a fee on a victim, a victim’s estate or the prosecuting attorney for enforcing an order of restitution
[MCL 780.766(20)]